

## Cases—Continued

	Page
<i>Matter of Ralph A. Freundlich</i> , 2 NLRB 147	13
<i>Matter of New York Transit Corp.</i> , 1 NLRB 192	13
<i>Montgomery Ward Co. v. National Labor Relations Board</i> , 377 F. 2d 452	19
<i>Nash v. Florida Industrial Commission</i> , 389 U.S. 235	8, 10, 11
<i>National Labor Relations Board v. Anchor Rome Mills</i> , 197 F. 2d 447	15
<i>National Labor Relations Board v. Barrett Co.</i> , 120 F. 2d 583	15
<i>National Labor Relations Board v. Dal-Tex Optical Co., Inc.</i> , 319 F. 2d 58	16
<i>National Labor Relations Board v. Darling &amp; Co.</i> , 420 F. 2d 63	16
<i>National Labor Relations Board v. Eastern Mass. Street Railway Co.</i> , 235 F. 2d 700, certiorari denied, 352 U.S. 951	16
<i>National Labor Relations Board v. Electro Motive Mfg. Co.</i> , 389 F. 2d 61	18, 19, 29
<i>National Labor Relations Board v. Gibbs Corp.</i> , 308 F. 2d 247	16
<i>National Labor Relations Board v. Marine Workers</i> , 391 U.S. 418	18
<i>National Labor Relations Board v. Ritchie Manufacturing Co.</i> , 354 F. 2d 90	7, 11, 17
<i>National Labor Relations Board v. Southland Paint Co.</i> , 394 F. 2d 717	18, 19
<i>National Labor Relations Board v. Syracuse Stamping Co.</i> , 208 F. 2d 77	16-17
<i>National Labor Relations Board v. Wyman-Gordon Co.</i> , 394 F. 2d 759	12, 15
<i>Ogle Protective Service</i> 149 NLRB 545	14

## Cases—Continued

PAGE

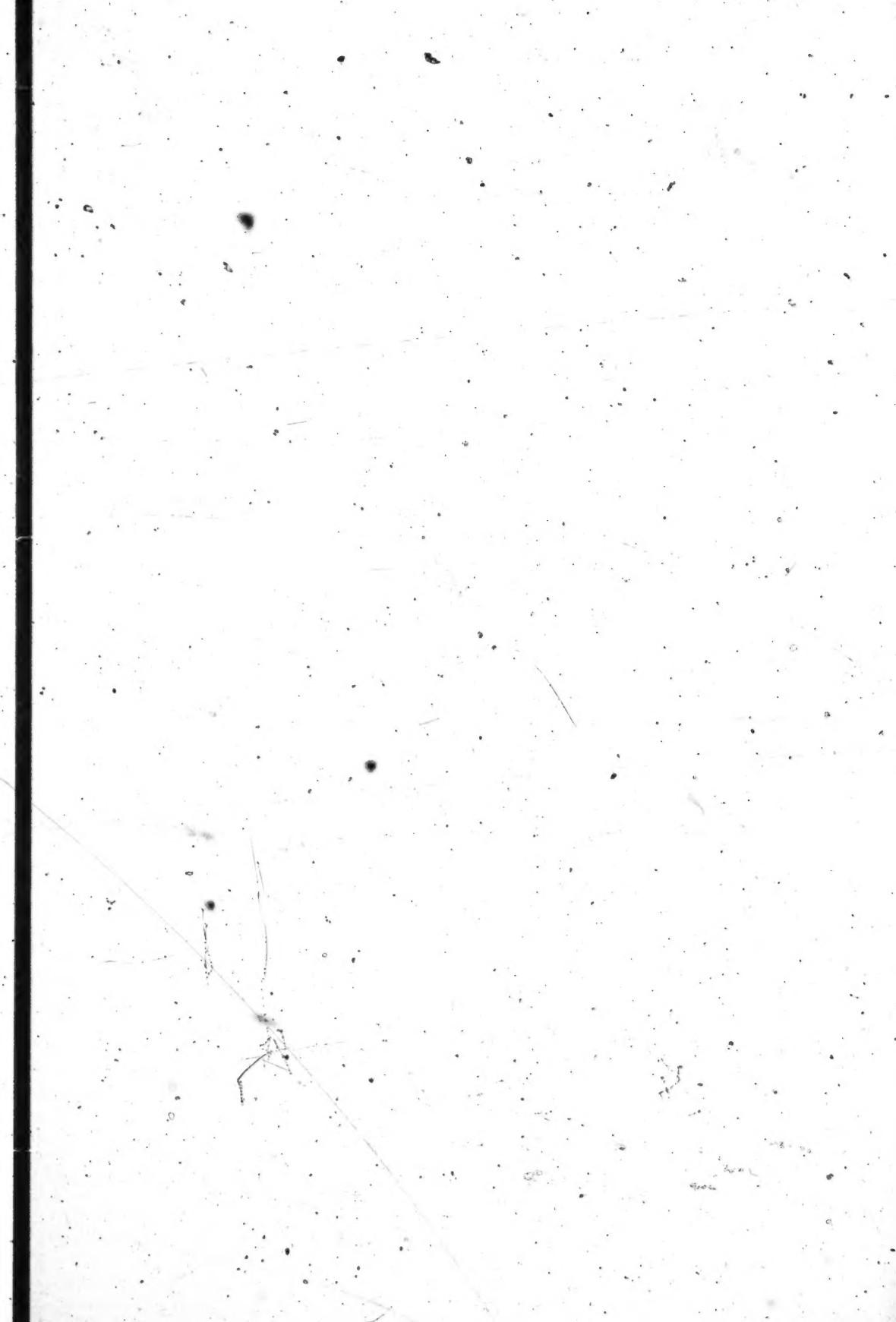
<i>Oil City Brass Works v. National Labor Relations Board</i> , 357, F.2d 466	18, 19-20
<i>Pedersen v. National Labor Relations Board</i> , 234 F.2d 417	15, 16
<i>Siemons Mailing Service</i> , 122 NLRB 81	6
<i>Texas Industries, Inc. v. National Labor Relations Board</i> , 336 F.2d 128	19

## Statutes:

National Labor Relations Act, as amended (61 Stat. 163, 73 Stat. 519, 29 U.S.C. 151, <i>et seq.</i> )	2
Section 7	2, 8, 9, 17
Section 8(a)(1)	2, 5, 6, 7, 8, 9, 17, 18, 19
Section 8(a)(3)	7, 14
Section 8(a)(4)	2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17
Section 8(a)(5)	7
Section 11	8, 12, 15, 19

## Miscellaneous:

Senate Committee Print, 1 Legislative History of the National Labor Relations Act (1935)	13, 14
Executive Order 6711-B, X NRA Codes 895, May 15, 1935	12, 13
Thirty-fifth Annual Report of the National Labor Relations Board (G.P.O. 1971)	14



In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-267

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBERT SCRIVENER, D/B/A AA ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 281-282) is reported at 435 F. 2d 1296. The decision and order of the National Labor Relations Board (A. 216-248, 272-278) are reported at 177 NLRB No. 65.

JURISDICTION

The judgment of the court of appeals (A. 283) was entered on January 6, 1971, and the Board's timely petition for rehearing *en banc* was denied on February 26, 1971 (A. 284). On May 19, 1971, Mr. Justice Blackmun extended the time for filing a petition for

a writ of certiorari to and including June 26, 1971. The petition was filed on June 11, 1971, and was granted on October 12, 1971 (A. 285). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether an employer's discharge of an employee because he has given a written statement to a Board agent during the investigation of an unfair labor practice charge violates Sections 8(a)(4) and 8(a)(1) of the National Labor Relations Act.

#### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right \* \* \* to form, join, or assist labor organizations \* \* \* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection \* \* \*.

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \*  
(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

**STATEMENT****A. THE BOARD'S FINDINGS OF FACT**

Respondent (the "Company") is an electrical contractor engaged in residential and commercial construction in Springfield, Missouri (A. 218, 220-221; 10, 11, 132). On March 18, 1968, five of the Company's six employees signed cards authorizing Local 453, International Brotherhood of Electrical Workers, AFL-CIO (the "Union") to represent them for collective bargaining (A. 255-256; 6-8, 19, 50, 59, 78, 85).<sup>1</sup> The following day, Union Representative Moore advised Company President Robert Scrivener of the Union's majority status and asked to negotiate a contract (A. 266; 9). Scrivener examined the cards and refused the Union's request (A. 226; 10).

Scrivener then visited his several jobsites, complained to the employees about their signing of union cards, and indicated that this could lead to their discharge (A. 228-230; 20, 60, 79). On March 20, he dismissed card signers Bill Cockrum, Smith, and Wilson (A. 231; 22, 51, 62). The same day, Scrivener hired two new employees, Hunt, a journeyman, and Statton, a helper (A. 150).

The following day (March 21) the Union filed charges with the Board, alleging that the Company had violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act (A. 232; 170). On March 26, Scrivener per-

<sup>1</sup>Cards were signed by employees Bill and Don Cockrum, Smith, Wilson, and Sanders (A. 225-226; 19, 50, 59, 78, 85). Employee Perrymen was the sole nonsigner (A. 226; 60).

mitted the three discharges to return to work. The next day he again released Bill Cockrum and Smith, on the ground that there was a lack of work; however, three junior employees—Perryman, the sole nonsigner among the original employees, and the two new employees, Hunt and Statton—were retained (A. 232; 25, 26, 52, 152, 157). Smith was recalled on April 1, and along with the other card signers except Bill Cockrum, who was not recalled, continued to work until April 18 (A. 232; 26).

On April 17, a field examiner from the Board's Regional office met with President Scrivener and discussed the charges filed on March 21 (A. 223; 65). That evening, the examiner interviewed the five card signers—Bill and Don Cockrum, Smith, Sanders and Wilson—at the Union hall, and received sworn statements from the last four (A. 233; 26-27, 64, 80, 88-89, 187-188). The following day, Scrivener asked Wilson, "Did you guys meet with the Labor Board last night?" When Wilson said he had, Scrivener said, "They sure don't talk much do they?" Wilson replied "no" and left to gather material for a job. (A. 233; 65.) Later, while Wilson and Don Cockrum were getting ready to go out, Scrivener again said, "You say you met with the Labor men last night?" Wilson replied "Till about 11 or 11:30," and Scrivener then added, "That old boy sure don't tell you nothing." (A. 233; 65.) Scrivener also questioned Sanders while he was at the shop getting ready to go to work that day (April 18), asking him, "Did the boys find out anything last

night?" Sanders answered, "Not that I know of." (A. 233; 80.)<sup>2</sup>

When the men reported back to the shop at the end of work on April 18, Scrivener dismissed Don Cockrum, Smith, Wilson, and Sanders with the explanation that he had no work for them to do (A. 234; 27, 65-66, 80-81, 96). Perryman, Statton, and Hunt continued to work. At this time the Company had substantial work to complete in at least three houses and one 11-unit apartment dwelling. (A. 235; 28, 97-98, 188.)

The Union filed an amended charge on May 13, 1968, adding the allegation that the dismissals of Don Cockrum, Smith, Wilson, and Sanders on April 18 were because they had given the statements to the examiner in connection with the earlier charge and that this action violated Sections 8(a)(1) and 8(a)(4) of the Act (A. 173).<sup>3</sup> A complaint was issued on both the earlier charge and the added allegation (A. 175).

#### B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Company's operations, while too small to satisfy the Board's self-imposed jurisdictional standard for unfair labor practice

---

<sup>2</sup> The Examiner credited the testimony of Sanders and Wilson and rejected Scrivener's claim that he had no knowledge whether the men talked to a Board field examiner until April 20 (A. 233-234). The Board accepted the Examiner's findings on this matter (A. 273).

<sup>3</sup> Sanders was never recalled (A. 234; 84). Smith and Wilson returned to work on May 4, and Don Cockrum in early June (A. 234; 29, 73).

cases,<sup>4</sup> were sufficiently extensive to "have an impact on and affect interstate commerce" and thus were "within the statutory jurisdiction of the Board" (A. 272-273). It concluded, in agreement with the Trial Examiner, that the April 18 dismissals of employees Don Cockrum, Smith, Wilson, and Sanders were "in retaliation against them for having met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against [the Company]" (A. 273);<sup>5</sup> and that this interference with the investigation—"an integral and essential stage of Board proceedings"—violated Sections 8(a)(1) and 8(a)(4) of the Act (*ibid.*). "In these circumstances, public policy requires the Board to assert jurisdiction for the purpose of remedying

---

<sup>4</sup> The Board's standard requires that an employer furnish goods and services or purchase materials which move in interstate commerce, totalling at least \$50,000 a year. *Siemens Mail- ing Service*, 122 NLRB 81, 85. Though the Company did not meet that standard, it obtained a substantial amount of supplies from out-of-state. During the previous year (1967), it purchased more than \$23,000 of materials from just one of its suppliers, about 90 percent of which originated from outside the State of Missouri; for 1968, its projected purchases of interstate goods from this supplier exceeded \$30,000 (A. 218-219, 273).

<sup>5</sup> The Trial Examiner based his finding of unlawful motivation on credited testimony showing that on April 18 President Scrivener knew of the employees' meeting with the field examiner and the identity of the men who were interviewed by him (A. 234), and Scrivener's "quick reaction in laying off the four employees prior to the end of the workweek and on the same day he determined they met with the Board field examiner and while there was work to do" (A. 236); the Examiner also noted Scrivener's "lack of credibility in testifying" (*ibid.*).

the [Company's] unlawful interference with the statutory right of all employees freely to resort to and participate in the Board's processes" (A. 274). Accordingly, the Board ordered the Company to cease and desist from the Sections 8(a)(1) and 8(a)(4) unfair practices, to reinstate the dismissed employees with back pay, and to post the usual notices (A. 275-276).<sup>6</sup>

### C. THE DECISION OF THE COURT OF APPEALS

The court of appeals declined to enforce the Board's order. In a *per curiam* opinion, it held, on the authority of its earlier decision in *National Labor Relations Board v. Ritchie Manufacturing Co.*, 354 F. 2d 90, that Section 8(a)(4) does not "encompass discharge of employees for giving written sworn statements to field examiners" (A. 282). It also refused to find that the discharges independently violated Section 8(a)(1), since "[t]o do so would be to overrule *Ritchie* implicitly, and we are not prepared to take that action" (*ibid.*).

#### SUMMARY OF ARGUMENT

Under Section 8(a)(4) of the National Labor Relations Act, it is an unfair labor practice for an em-

<sup>6</sup> The Trial Examiner also found that the Company had engaged in other conduct which violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act, and recommended that the Board remedy these violations, too. However, the Board concluded (with one member dissenting) that it would not effectuate the policies of the Act to assert its jurisdiction over these "independent and unrelated" violations, and dismissed those portions of the complaint (A. 274-275).

ployer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act \* \* \*." By enacting Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238. To achieve that objective, Section 8(a)(4) must be construed to protect employees from employer retaliation not only where they have filed a charge or actually given testimony at a formal Board hearing, but also where, as in this case, they have given a statement to a Board agent during an investigation of unfair labor practices. This interpretation of Section 8(a)(4) comports with the Board's long-standing view and the legislative history, and is supported by the Board's subpoena powers under Section 11 of the Act and the protections that apply there. The courts of appeals for other circuits uniformly have construed Section 8(a)(4) liberally to effectuate fully the remedial purpose behind it, and to protect employee participants in Board investigations who have given statements but have not filed charges or formally testified.

The dismissals here also independently violated Section 8(a)(1) of the Act. Under that section, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 protects the employees' right "to form, join, or assist labor organizations \* \* \* and to engage in other concerted

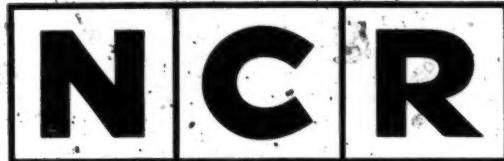
9

activities for the purpose of collective bargaining or other mutual aid or protection." This guarantees includes the right of employees to participate in the Board's administrative processes, and to give information to it and to have other employees do the same. If their employer discharges them for doing so—as in the present case—this restrains them from freely exercising their Section 7 rights.

#### **ARGUMENT**

**AN EMPLOYER'S DISCHARGE OF AN EMPLOYEE BECAUSE HE HAS GIVEN A WRITTEN STATEMENT TO A BOARD AGENT DURING THE INVESTIGATION OF AN UNFAIR LABOR PRACTICE CHARGE VIOLATES SECTIONS 8(a)(4) AND 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT.**

The Board, on the basis of the testimony credited by the Trial Examiner, found that the Company terminated four employees because they had given affidavits to a Board field examiner in connection with his investigation of unfair labor practice charges which had been filed against the Company. The court of appeals rejected the Board's holding that this interference with Board investigative processes violated Sections 8(a)(4) and 8(a)(1) of the Act, ruling, in effect, that the Act affords employees no protection against reprisal for such participation in a Board investigation. In the court's view, the Act protects an employee against reprisal only for filing a charge or giving testimony at a formal hearing.



# MICROCARD<sup>®</sup> EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES  
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

CARD '8

### A. SECTION 8(a)(4)

1. Under Section 8(a)(4), it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act \* \* \*." We submit that this section covers not only the filing of charges and testifying, but also the giving of written statements to Board agents during a Board investigation of unfair labor practices. All three types of conduct are essential to the proper performance of the Board's duties, and Congress intended to protect all of them from employer retaliation. Thus, where, as in this case, an employee gives a Board agent a sworn statement in connection with an investigation of unfair labor practice charges and his employer dismisses him because of his doing so, Section 8(a)(4) has been violated.<sup>2</sup>

This interpretation comports fully with the section's manifest objective. As this Court recently noted, by enacting Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238. Such freedom is necessary "to prevent the Board's channels of information from being dried up by em-

---

<sup>2</sup> There is no evidence to support respondent's claim (Br. in Opp. pp. 4-5, 31) that the Section 8(a)(4) allegations against it were "trumped up" by a Board agent, who assertedly interviewed the discriminatees because he hoped to "lay a foundation" for a charge that respondent had violated that section.

ployer intimidation of prospective complainants and witnesses." *John Hancock Mutual Life Ins. Co. v. National Labor Relations Board*, 191 F. 2d 483, 485 (C.A. D.C.). The basic aim was to keep free and unimpeded the channels of communication between employees and the Board and to dispel any fear by employees that they risked employer reprisal by co-operating with the Board in the investigation and trial of unfair labor practice charges, irrespective of the nature of the information they give to the Board or the manner in which they do so.<sup>8</sup>

The legislative purpose indicates that the protections afforded by Section 8(a)(4) were not intended, as the court below stated in its earlier *Ritchie* decision and reiterated here, to be limited only to employees who have "actually testified at a hearing," and thus not "cover preliminary preparations for giving testimony" (354 F.2d at 101). For a preliminary prepara-

---

<sup>8</sup> Respondent contends that "[i]t would be absurd to construe Section 8(a)(4) as forbidding an employer from discriminating against an employee for making statements to an NLRB investigator in informal pre-complaint investigation," since the employer ordinarily would not know what an employee might have told the investigator and would have no reason to discharge the employee for statements that might well be favorable to the employer, (Br. in Opp., pp. 24-26). This argument misconceives the fundamental policy underlying Section 8(a)(4). There was concern with more than merely protecting employees against employer reprisals for having given testimony unfavorable to the employer. Congress intended by this section to assure that an employee would "be completely free from coercion against reporting \*\*\* [information about unfair labor practices] to the Board" (*Nash, supra*, 389 U.S. at 238, emphasis supplied).

tion, including investigating and obtaining statements from employees, is no less essential a part of the administrative process than the other steps that are admittedly covered by the section, the filing of charges that initiate the investigation and the formal hearing that follows.

Section 8(a)(4) must, therefore, be construed to protect an employee participating in the investigative process from employer retaliation for his having done so, irrespective of whether the employee filed a charge or actually gave testimony at a formal hearing. The phrase "given testimony" in Section 8(a)(4) is sufficiently broad to support this conclusion, particularly in light of the purpose that this section was intended to serve. Cf. *National Labor Relations Board v. Wyman Gordon Co.*, 394 U.S. 759, where this Court held that "evidence" as used in Section 11 of the Act "means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation" (394 U.S. at 768, footnote omitted).<sup>1</sup>

2. This interpretation of Section 8(a)(4) accords with the Board's long-standing view and the practicalities of agency action in this area.

Section 8(a)(4) had its origin in the National Industrial Recovery Act. Executive Order 6711-B under that Act (X NRA Codes 895, issued May 15, 1935) provided that "No employer subject to a code of fair competition approved under [the National Industrial Recovery Act] shall dismiss or demote any employee for making a complaint or giving evidence with respect

*to an alleged violation of the provisions of any code of fair competition approved under said title"* (emphasis supplied). The first National Labor Relations Board interpreted the italicized phrase to protect not only the act of testifying at a formal Board hearing, but also any "giving" of information relative to violations of the National Industrial Recovery Act. See *Matter of New York Rapid Transit Corp.*, 1 NLRB 192, 193 (1934) (discharge of four employees because they gave affidavits to the Board's New York Regional Office in connection with the investigation of charges that their employer had violated the NIRA); *Matter of Ralph A. Freundlich*, 2 NLRB 147, 148 (1935) (discharge of an employee who had testified against his employer in a state court action to enforce a bargaining agreement).

While Section 8(a)(4) now reads "testimony," rather than "evidence," there is nothing in the legislative history suggesting that this change was intended to diminish the broad protection previously accorded, so as to expose employees to reprisals if their testimony is given through an affidavit during an investigation rather than as a witness in a formal hearing. To the contrary, a Senate Labor Committee memorandum described the new language as "merely a reiteration" of the provision found in Executive Order 6711-B, and added that the "need for this provision is attested" by the Board decisions cited above. See, Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress), Senate Committee Print, p. 29, 1 Legislative History of the National Labor

Relations Act (1935), at p. 1355. There is no sound reason why Congress would have wanted to contract the scope of the protection employees previously had.<sup>9</sup>

No other result would square with the practicalities of agency action in this area. An employee participating in a Board investigation often is not called to testify at a formal Board hearing. This may be because his testimony is cumulative, or because, as happens frequently, the case is settled or dismissed before hearing (see *Thirty-fifth Annual Report of the National Labor Relations Board*, 169 (G.P.O. 1971)). Or, as happened here, the employee may be discharged as soon as the employer learns that he has participated in the investigation, and long before a formal Board hearing at which he could testify has started. If the employer may punish the employee for giving a statement in the investigation—which is the effect of the Eighth Circuit's narrow construction of Section 8(a)(4)—employees will be much less

<sup>9</sup> In the court below as well as before the Board, respondent relied on *Ogle Protective Service*, 149 NLRB 545. In that case, the Trial Examiner concluded that the discharge of an employee violated Section 8(a)(3), but declined to find that, because the employee was under subpoena to testify at a Board hearing when discharged, the discharge also violated Section 8(a)(4). “[s]ince the discrimination does not come within the precise language of Section 8(a)(4)” (*id.* at 566). However, no exceptions were filed to the Examiner's decision and the Board adopted it *pro forma* (*id.* at 546, n. 2) — that is, without passing on its propriety. Where the Board itself has dealt with the scope of Section 8(a)(4), it has consistently held that it extends to and protects employee participation in the entire investigative process, not just actually filing charges or testifying at a hearing.

willing to cooperate in Board investigations, thus significantly impairing the Board's effectiveness in carrying out its duties.

3. Section 11 of the Act (29 U.S.C. 161) also supports this interpretation of Section 8(a)(4). Under Section 11 the Board is empowered to issue subpoenas "[f]or the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it." Subpoenas so issued may require "the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation."<sup>10</sup> Persons subpoenaed in connection with (and their resulting participation in) Board investigations are entitled to protection under Section 8(a)(4) from employer retaliation on that account regardless of whether they have actually filed charges or testified at a formal Board hearing, since "Congress intended the protection [under Section 8(a)(4)] to be as broad as the power [under Section 11]." *Pedersen v. National Labor Relations Board*, 234 F. 2d 417, 420 (C.A. 2).

In the present case, had the employees refused to give statements to the Board's investigator voluntarily, the Board could have compelled them to do so under Section 11, in which event, under the reasoning of *Pederson, supra*, Section 8(a)(4) would have been fully applicable to protect them from employer discrimination for having done so. There is no basis for

---

<sup>10</sup> See, generally, *National Labor Relations Board v. Wymarc-Gordon Co.*, 394 U.S. 759, 768; *National Labor Relations Board v. Barrett Co.*, 120 F. 2d 583 (C.A. 7); *National Labor Relations Board v. Anchor Rome Mills*, 197 F. 2d 447 (C.A. 5).

denying similar protections to a voluntary participant; whose acts in all other respects are the same as the employee who is subpoenaed.

The courts of appeals for the other circuits uniformly have construed Section 8(a)(4) liberally so as to effectuate fully the remedial purpose behind it. Thus, the Fifth Circuit in *M & S Steel Company v. National Labor Relations Board*, 353 F. 2d 80, summarily sustained the Board's finding (148 NLRB 789, 795) that an employer violated Section 8(a)(4) by discharging an employee because he gave an affidavit to a Board agent investigating an unfair labor practice charge. In *National Labor Relations Board v. Dal-Tex Optical Co., Inc.*, 319 F. 2d 58, 59 (C.A. 5), that court enforced a Board determination (131 NLRB 715, 721, 729-739) that the discharge of an employee, because he appeared (but did not testify) at a Board hearing, violated Section 8(a)(4). The courts of appeals also have read Section 8(a)(4) broadly in other contexts to achieve the legislative objective embodied therein.<sup>11</sup>

---

<sup>11</sup> See, e.g., *National Labor Relations Board v. Eastern Mass. Street Railway Co.*, 235 F. 2d 700 (C.A. 1), certiorari denied, 352 U.S. 951, enforcing 110 NLRB 1963, 2046 (refusal to reinstate an employee because he was named in a charge filed by the union); *National Labor Relations Board v. Darling & Co.*, 420 F. 2d 63, 66 (C.A. 7) (denial of severance pay to employees because their union representative had filed a charge); *National Labor Relations Board v. Gibbs Corp.*, 308 F. 2d 247 (C.A. 5), enforcing, 131 NLRB 955 (discharge of employees who their employer believed were supporting charges filed by a fellow employee); *Pedersen v. National Labor Relations Board*, 234 F. 2d 417, 420 (C.A. 2) (discharge of a supervisor for giving testimony); *National Labor Relations Board v. Syracuse*

### B. SECTION 8(a)(1)

Under Section 8(a)(1), it is unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." Section 7 guarantees employees the right "to form, join or assist labor organizations \* \* \* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection \* \* \*." This guarantee includes the right of employees to participate in the administrative processes of the Board and to give information to it. If their employer discharges them for doing so—as in the present case—this restrains them from freely exercising their Section 7 rights. Thus, apart from Section 8(a)(4), the discharges here violated Section 8(a)(1).<sup>12</sup>

---

*Stamping Co.*, 208 F. 2d 77, 79-80 (C.A. 2). (refusal to rehire a laid-off employee because she filed a "charge"); *John Hancock Mutual Life Insurance Co. v. National Labor Relations Board*, 191 F. 2d 483 (C.A. D.C.) (refusal to hire a job applicant for giving testimony). But cf. *Hoover Design Corporation v. National Labor Relations Board*, 402 F. 2d 987 (C.A. 6); where the court held that a discharge because the employee threatened to file unfair labor practice charges with the Board did not violate Section 8(a)(4), citing in support the *Ritchie* case.

<sup>12</sup> There is no substance to respondent's contention (Br. in Opp., p. 15) that the Board failed to find that the termination of the employees for participating in the Board's investigation also violated Section 8(a)(1) of the Act. The Board specifically found that "Respondent's conduct falls within the prohibitions of Section 8(a)(1) and (4) of the Act" (A. 273). The dismissal of the complaint pertained only to allegations of "independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act" (A. 275).

It is firmly established that "employees have a right to have their privileges secured by the Act vindicated through the effective administrative proceedings provided by Congress." *Oil City Brass Works v. National Labor Relations Board*, 357 F. 2d 466, 471 (C.A. 5). Accord, *King Radio Corp. v. National Labor Relations Board*, 398 F. 2d 14, 22 (C.A. 10); *National Labor Relations Board v. Southland Paint Co.*, 394 F. 2d 717, 721 (C.A. 5); *National Labor Relations Board v. Electro Motive Mfg. Co.*, 389 F. 2d 61, 62 (C.A. 4); compare *National Labor Relations Board v. Marine Workers*, 391 U.S. 418. For the proceedings to be "effective," there must be witnesses (including employees) willing to give the Board information "without fear of being penalized by their employer" (*Oil City Brass Works, supra*, 357 F. 2d at 471). Section 8(a)(1) stands as a primary safeguard of the privileges secured by the Act, and prohibits employer reprisals against employees because of their participation in Board investigations.

This is the underlying rationale of numerous decisions by courts of appeals sustaining this interpretation of Section 8(a)(1). Thus, employer discrimination against supervisory personnel for testifying at a Board hearing violates Section 8(a)(1), though supervisors generally are not covered by the Act, since discrimination in this circumstance directly infringes the rights of rank-and-file employees to needed information and an effective administrative proceeding. See the *Oil City*, *King Radio*, *Southland Paint*, and *Electro Motive* cases, *supra*. In *Southland Paint* and

*Electro Motive*, as in the present case, the "testimony" was in the form of an affidavit. "The giving of an affidavit in the course of a Board proceeding is equivalent to giving testimony" (*Southland Paint, supra*, 394 F. 2d at 721).

Section 8(a)(1) is also violated where an employer questions employees about the contents of statements given to Board agents and demands copies. *Texas Industries, Inc. v. National Labor Relations Board*, 336 F. 2d 128 (C.A. 5). The court explained (*id.* at 134): "In order to assure the vindication of employee rights under the Act, it is essential that the Board be able to conduct effective investigations and \* \* \*. [receive] supporting statements from employees. We feel that preserving the confidentiality of employee statements is conducive to this end." See, also, *Montgomery Ward & Co. v. National Labor Relations Board*, 377 F. 2d 452, 455-456 (C.A. 6). An employer violates Section 8(a)(1) where he goes further and actually takes reprisals against employees for giving statements to the Board—as happened in this case.

Again, Section 11 of the Act confirms this interpretation of Section 8(a)(1). Under Section 11 of the Act, the Board could have compelled the employees here to give statements had they not done so willingly (see p. 15, *supra*). Employer discrimination resulting from employee participation in Board proceedings pursuant to subpoena is prohibited by Section 8(a)(1), since here, too, the protections afforded "are co-extensive with its [the Board's] subpoena powers." *Oil City Brass Works v. National Labor Relations*

*Board, supra*, 357 F. 2d at 471. And, as explained in *Electro Motive*, there is no basis for denying similar protections because the employee voluntarily participates (389 F. 2d at 62):

In terms of the effective administration of the Act \* \* \* we see no distinction between the protection of managerial employees who cooperate willingly with the Board and of those who render assistance under legal compulsion. The effect of the discharge, in either event, is to tend to dry up legitimate sources of information to Board agents, to impair the functioning of the machinery provided for the vindication of the employees' rights and, probably, to restrain employees in the exercise of their protected rights.

#### CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted,

ERWIN N. GRISWOLD,  
*Solicitor General.*

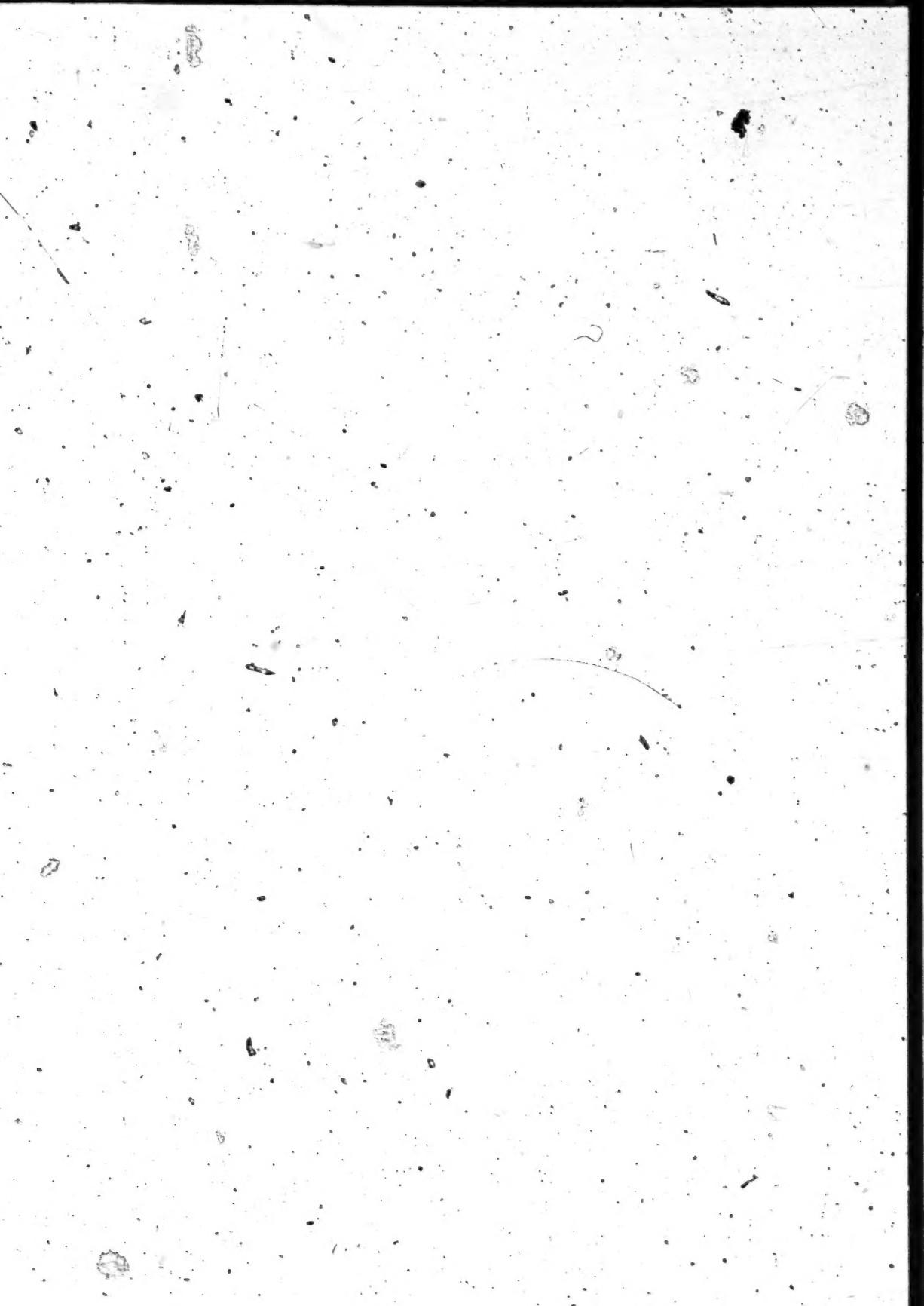
WM. TERRY BRAY,  
*Assistant to the Solicitor General.*

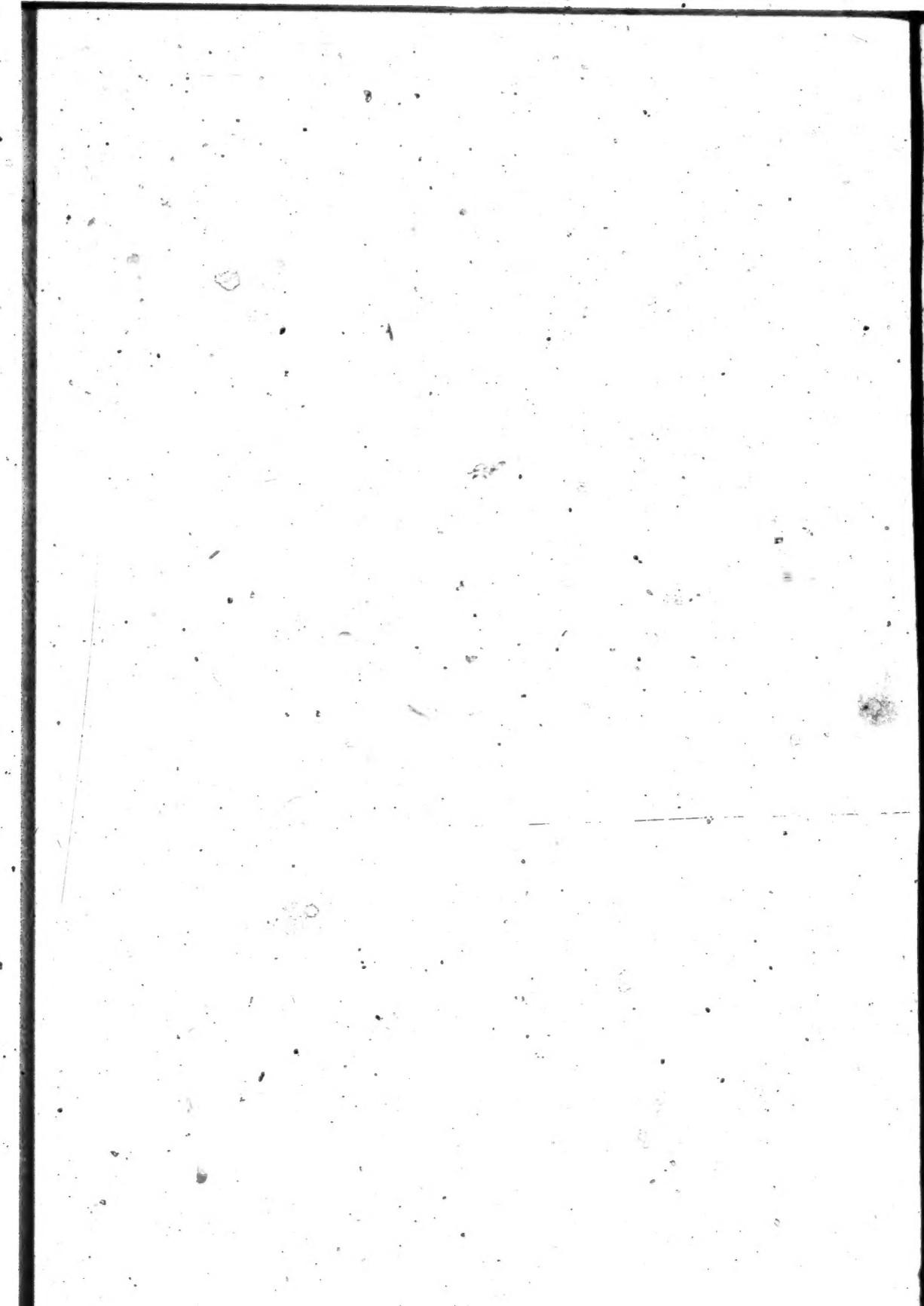
PETER G. NASH,  
*General Counsel,*

NORTON J. COME,  
*Assistant General Counsel,*

PAUL J. SPIELBERG,  
*Attorney,*  
*National Labor Relations Board.*

NOVEMBER 1971.





U.S. SUPREME COURT

Supreme Court, U.S.

FILED

DEC 22 1971

ROBERT SEAVIER, CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-267

NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

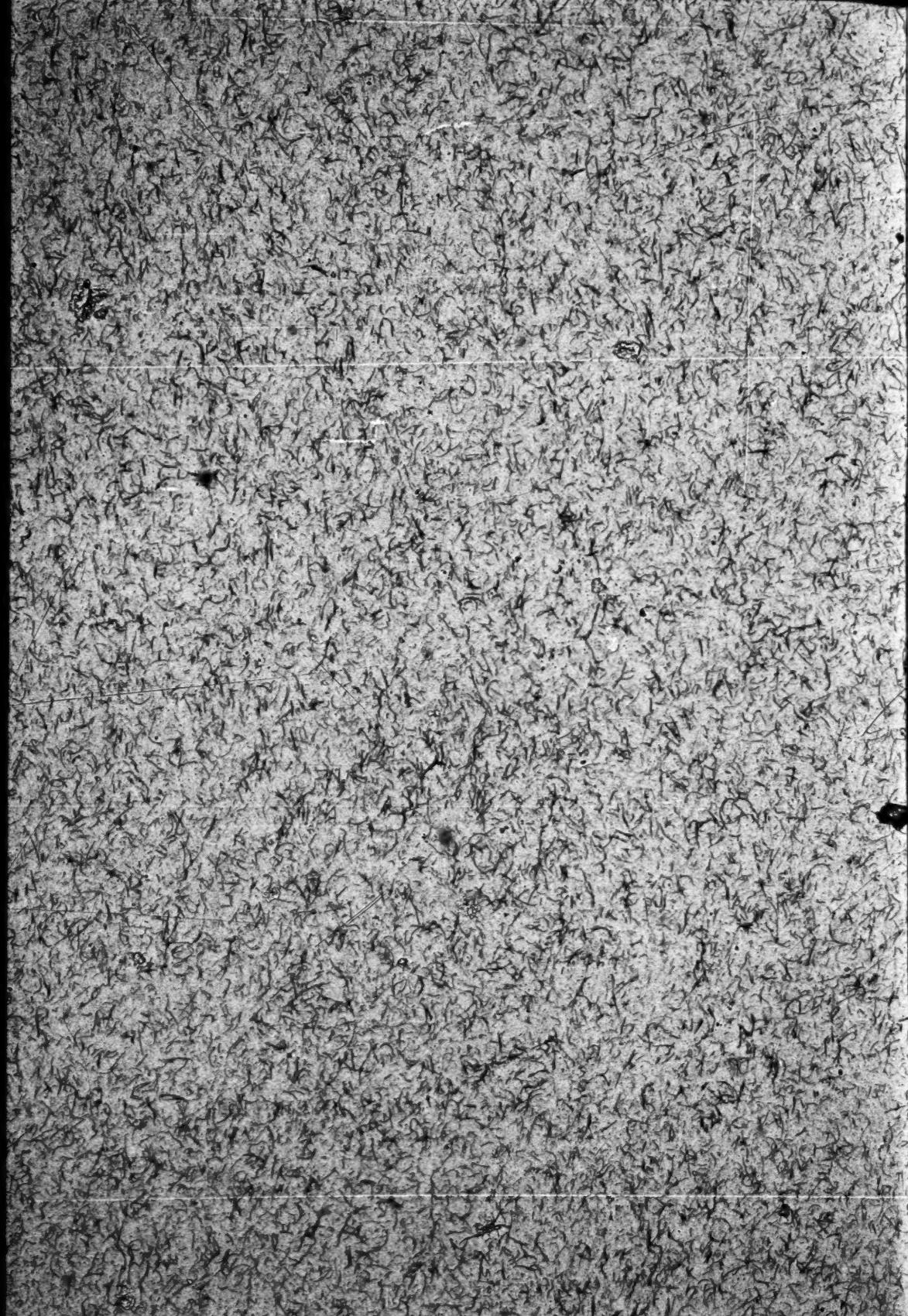
ROBERT SCRIVENER, D/B/A AA ELECTRIC COMPANY,  
*Respondent.*

On Writ of Certiorari to the United States Court  
of Appeals for the Eighth Circuit

BRIEF FOR ASSOCIATED BUILDERS AND  
CONTRACTORS, INC., AS AMICUS CURIAE

WILLIAM B. BARTON  
HARRY J. LAMBETH  
BARTON & LAMBETH  
806 - 15th Street, N.W.  
Washington, D. C. 20005

Attorneys for  
Associated Builders and  
Contractors, Inc.



## INDEX

	Page
Introduction .....	1
The Interest of Associated Builders & Contractors, Inc. ....	2
Questions Presented .....	2
Statutes Involved .....	3
Statement .....	3
Summary of Argument .....	9
Argument .....	9
A. The Lack of Substantial Evidence .....	9
B. The Purposes of the Act .....	15
C. The Meaning of Section 8(a)(4) as Revealed by its History .....	16
Conclusion .....	20

## CITATIONS

Cases:	
<i>Albert J. Barston &amp; TWOC</i> , 23 NLRB 666 (1940)	19
<i>Cardinal Extrusion Co.</i> , 136 NLRB 615 (1962)	12
<i>Fashion Fair, Inc.</i> , 163 NLRB 97 (1967)	15
<i>F. W. Poe Manufacturing Co. &amp; TWV</i> , 27 NLRB 1257 (1940)	19
<i>General Adjustment Bureau v. NLRB</i> , 331 F2d 913 CA-7 (1963)	15
<i>Harris Hub Co.</i> , 142 NLRB 287 (1963)	15
<i>Henrich Lumber, Inc.</i> , 100 NLRB 1270 (1952)	15
<i>Kramer Co. (The) &amp; ILGWU</i> , 29 NLRB 921 (1941)	19
<i>Lowell Sun Publishing Co.</i> , 136 NLRB 206 (1962)	15
<i>Matter of Ralph A. Freundlich, Inc.</i> , 2 NLRB 147 (1935)	18
<i>Matter of New York Rapid Transit Corp.—oration</i> 1 NLRB 192 (1934)	18

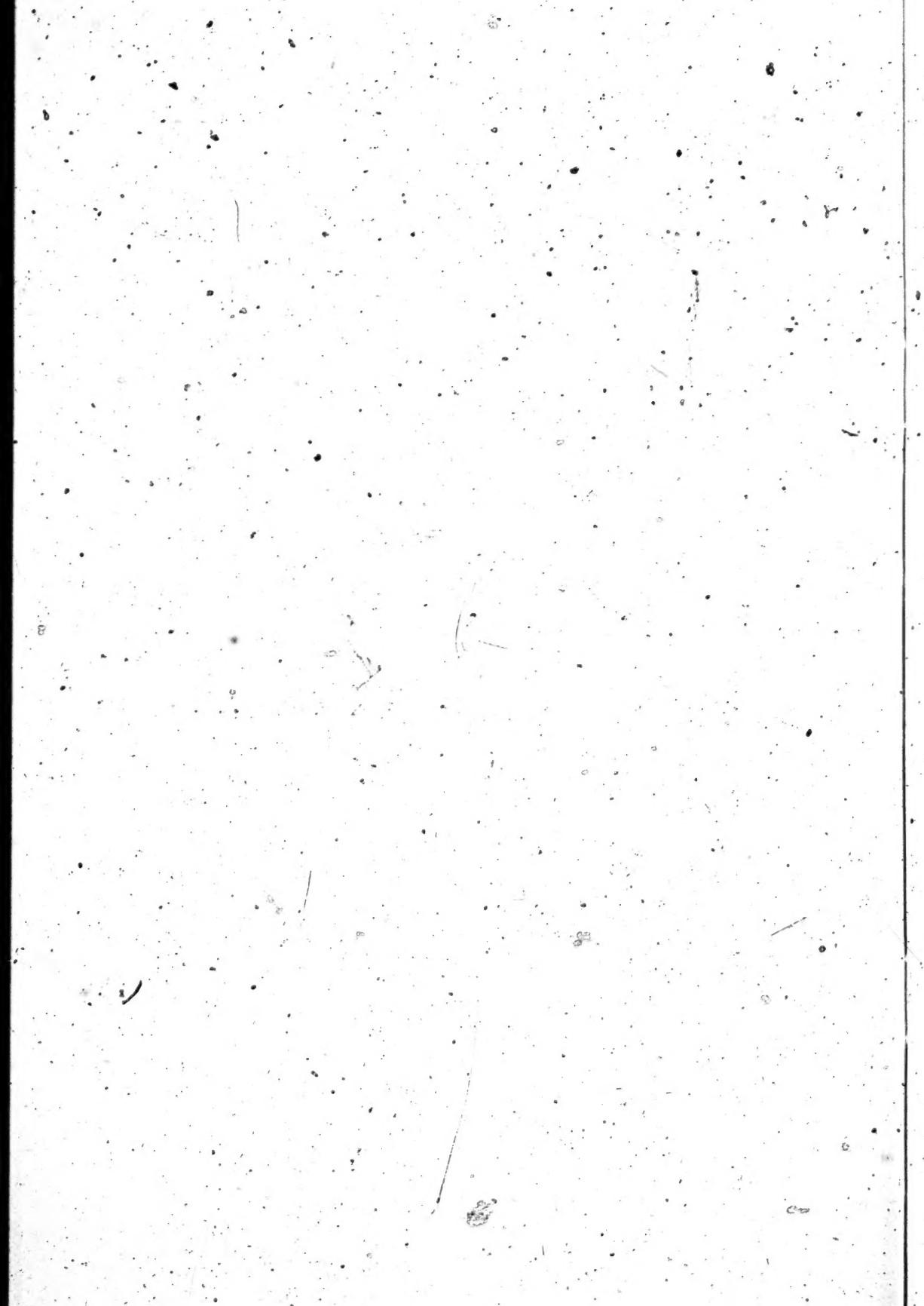
## INDEX—Continued

	Page
<i>Matter of Zenith Radio Corporation</i> , 1 NLRB 202 (1934)	18
<i>NLRB v. American Tube Bending Co.</i> , 134 F2d 998 CA-2 (1943, cert. den. 320 U.S. 768 (1943))	11
<i>NLRB v. Isis Plumbing &amp; Heating Co.</i> , 322 F2d 913 CA-9 (1963)	15
<i>NLRB v. The Newton Company</i> , 236 F2d 438 CA-5 (1956)	15
<i>NLRB v. Pittsburgh S.S. Co.</i> , 340 U.S. 498 (1951)..	13
<i>NLRB v. Sunbeam Lighting Company, Inc.</i> , 318 F2d 661 CA-7 (1963)	15
<i>NLRB v. Virginia Electric Power Co.</i> , 314 U.S. 469 (1941)	11
<i>Ogle Protection Service, Inc.</i> , 149 NLRB 545, 566 (1964)	16
<i>Pedersen v. NLRB</i> , 234 F2d 417 CA-2 (1956)	19
<i>Redwing Carriers, Inc.</i> , 165 NLRB 69, 66, 67 (1967)	13
<i>Snap Out Binding &amp; Folding, Inc.</i> , 166 NLRB 316 (1967)	12
<i>Standard Electric Co. v. NLRB</i> , 387 F2d 717 CA-5 (1968)	15
<i>Tru-Scale Products, Inc.</i> , 147 NLRB 1122 (1964)	15
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474, 490 (1951)	13
<i>Western Lace &amp; Line Co., d/b/a Western Fishing Lines Co.</i> , 103 NLRB 1408 (1953)	15
 Statutes:	
Administrative Procedure Act, Section 10(e) (60 Stat. 237, 248; 5 USC 706)	3, 13, 14
National Labor Relations Act as amended	3
Section 7	3
Section 8(a) (1)	3
Section 8(a) (4)	3, 9, 15, 16, 19
Section 8(c)	12
Section 10(b)	19
Section 10(f)	14, 15

**INDEX—Continued.**

iii

	Page
The National Industrial Recovery Act (Ch. 90, 48 Stat. 195) (1933) .....	17
The Wagner Act (49 Stat., 449) (1935) .....	3, 19
<b>Miscellaneous:</b>	
Congressional Record—79th, tr. 7571 May 5, 1935..	17
Constitution of IBEW for 1970 .....	5
Executive Order, June 29, 1934 .....	18
House Committee on Labor, Hearings on H.R. 6288, 1st Session, 74th Congress .....	17
Resolution No. 44, 73rd Congress .....	18
Senate Education and Labor Committee, Compar- ison of S. 2926 and S. 1958, 73rd & 74th Con- gresses .....	18
Senate Education and Labor Committee, Report No. 573, 74th Congress .....	17
The Developing Labor Law .....	16



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

---

No. 70-267

---

NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

ROBERT SCRIVENER, D/B/A AA ELECTRIC COMPANY,  
*Respondent.*

---

On Writ of Certiorari to the United States Court  
of Appeals for the Eighth Circuit

---

BRIEF FOR ASSOCIATED BUILDERS AND  
CONTRACTORS, INC., AS AMICUS CURIAE

---

I. INTRODUCTION

This amicus curiae brief is submitted by Associated Builders and Contractors, Inc. as provided in Rule 42(2) of the Rules of the Supreme Court of the United States, the petitioner and respondent having given their consent for Associated Builders and Contractors, Inc. to file such a brief.